

**ZAMZAM ARABIC FOOD HOLDING SDN BHD & ANOR
v. JOHANJANA CORPORATION SDN BHD**

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HADHARIAH SYED ISMAIL JCA
GUNALAN MUNIANDY JCA

[CIVIL APPEAL NO: B-02 (IM) (NCC)-1649-11-2020]
4 APRIL 2022

Abstract – *The underlying purpose of s. 540(1) of the Companies Act 2016 is to impose a personal responsibility and liability on the director and/or the person who controls the company and not the company itself for carrying on the business of the company with intent to defraud a creditor. The word ‘person’ in s. 540(1) in its ordinary and natural meaning means ‘a real person.’ He could be a director, managing director or person in control of the company. Therefore, to give effect to s. 540(1), the court must apply the ordinary meaning of ‘person’. It does not include a company.*

COMPANY LAW: *Fraudulent trading – Intent to defraud – Allegation of – Claim for declarations that fraud or fraudulent scheme under s. 540 of Companies Act 2016 was perpetrated to evade paying debts – Whether company ‘person’ under s. 540(1) of Companies Act 2016 – Whether director could be sued despite not being director of company allegedly carrying on business with intent to defraud – Whether s. 540(3) of Companies Act 2016 applicable – Whether there was cause of action – Whether there was sufficient evidence to bring case under s. 540(1) of Companies Act 2016 against company and director – Whether claim obviously and plainly unsustainable*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out writ of summons and statement of claim – Claim for declarations that fraud or fraudulent scheme under s. 540 of Companies Act 2016 was perpetrated to evade paying debts – Whether claim disclosed reasonable cause of action – Whether claim obviously and plainly unsustainable – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)*

WORDS & PHRASES: *‘person’ – Companies Act 2016, s. 540(1) – Whether to apply ordinary meaning of ‘person’ – Whether meant ‘a real person’ – Whether include a company – Whether s. 3 of Interpretation Acts 1948 and 1967 could be read into s. 540(1) of Companies Act 2016 – Purpose of s. 540(1) – Whether to impose personal responsibility and liability on director/person who controls company and not company itself for carrying on business with intent to defraud creditor*

- A This was an appeal by the appellants ('second and tenth defendants') against the decision of the High Court dismissing the defendants' application to strike out the respondent's ('plaintiff') writ of summons and statement of claim. The first defendant's company was the tenant of the plaintiff with regard to seven premises ('premises'). Tenancy agreements were executed and signed
- B between the plaintiff and the first defendant. At all material times, the first defendant's company operated at the premises as an Arabic food restaurant and banquet hall known as 'Restoran ZamZam.' The first defendant's company defaulted the tenancy agreements by non-payment of rental and refusal to surrender vacant possession upon expiry of the said tenancies. *Via*
- C Shah Alam Sessions Court ('Suit 21'), the plaintiff sued the first defendant for breach of tenancy agreements, arrears of rental, vacant possession and damages. The Sessions Court allowed the plaintiff's claim, which was affirmed by the High Court. It was an undisputed fact that the second and tenth defendants were never parties to the tenancy agreements and were also not named as parties in Suit 21. The first defendant vacated the plaintiff's
- D premises and moved its business operation to another premise. The second defendant was the company which currently ran the business of Restoran ZamZam at Seksyen 13 Shah Alam and the tenth defendant was the director and shareholder of the second defendant. Subsequently, the plaintiff discovered that the first defendant's business operation and goodwill known
- E as Restoran ZamZam was transferred to the second defendant wherein a new Arabic food restaurant under the same name was in active operation at Seksyen 13 Shah Alam. As the debt remained unpaid, the plaintiff filed a winding-up petition against the first defendant which was allowed unopposed. The first defendant was then wound up. As a result of the first
- F defendant's failure to satisfy the judgment sum obtained in Suit 21, the plaintiff filed a suit at the High Court against the eleven defendants. The plaintiff's claim against the defendants were for declarations that a fraud or fraudulent scheme under s. 540 of the Companies Act 2016 ('Companies Act') was perpetrated against the plaintiff to evade the first defendant from
- G paying its debt to the plaintiff and that the defendants were personally liable to pay the debt and liability of the first defendant in the sum of RM1,872,966.49. The second and tenth defendants filed an application (encl.16) to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012 ('ROC') on the ground that it did not disclose a reasonable
- H cause of action and was an abuse of the court process. The second defendant's striking out application was premised on the following grounds (i) s. 540 of the Companies Act only involves an individual and not a company; (ii) the second defendant was a company that did not fall within the definition of 'any person' in s. 540(1) of the Companies Act; (iii) the plaintiff had no cause
- I of action against the second defendant; (iv) the first defendant's failure to pay

its debt to the plaintiff had nothing to do with the second defendant who was not a party to the tenancy agreements between the plaintiff and the first defendant; and (iv) on the face of the pleadings, the plaintiff's claim against the second defendant was obviously unsustainable. The tenth defendant's striking out application was premised on the following grounds: (i) as the plaintiff had no cause of action against the second defendant, the tenth defendant as the director of the second defendant should not be made a party to this action; (ii) the second defendant was incorporated in 2015 and carried on a restaurant business simultaneously with the first defendant at the material time; and (iii) the plaintiff could not prove that the tenth defendant had committed any fraudulent transaction as alleged by the plaintiff. The Judicial Commissioner ('JC'), in dismissing the second defendant and tenth defendant's application, held *inter alia* that (i) the word 'person' in s. 540(1) of the Companies Act includes a corporation based on the definition of the word 'person' in s. 3 of the Interpretation Acts 1948 and 1967 ('Interpretation Act') and (ii) s. 540(1) read together with s. 540(3) and (4) of the Companies Act enabled any company or an individual who was involved in the activity or in receipt of proceeds of fraudulent trading to be named as a defendant. Hence, this appeal. The three main issues that arose were (i) whether the second defendant company was a 'person' under s. 540(1) of the Companies Act; (ii) whether the tenth defendant could be sued despite not being a director of the first defendant; and (iii) whether the plaintiff's claim against the second and tenth defendants was plainly unsustainable.

Held (allowing appeal; setting aside order of High Court)

Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

- (1) Section 3 of the Interpretation Act could not be read into s. 540(1) of the Companies Act as it would give effect to inconsistent meanings to s. 540(1). The underlying purpose of s. 540(1) is to impose a personal responsibility and liability on the director and/or the person who controls the company and not the company itself for carrying on the business of the company with intent to defraud a creditor. The wording in s. 540(1) is plain and unambiguous. The word 'person' in s. 540(1) in its ordinary and natural meaning meant 'a real person.' He could be a director, managing director or person in control of the company. Therefore, to give effect to s. 540(1), the court must apply the ordinary meaning of 'person' and not the meaning assigned to it by the plaintiff. Section 540(1) has penal consequences. Only a real person could have an intention to defraud a creditor. Such an intention does not exist in a company. Therefore, the JC had erred in law in accepting that the word 'person' in s. 540(1) of the Companies Act include a company. The

- A word ‘person’ in s. 540(1) of the Companies Act does not include a company. The plaintiff did not have a cause of action against the second defendant, which was a company. (paras 27, 28 & 31)
- (2) The tenth defendant was not a director of the first defendant, a company who had allegedly carried on its restaurant business with intent to defraud. The tenth defendant was a director of the second defendant. The tenth defendant had no involvement at all in the business of the first defendant. This being the case, s. 540(1) was not applicable to an individual who is not a director in a company that carries on business with intent to defraud a creditor. The JC had erred in holding s. 540(3) of the Companies Act enabled any person who is not a director in the company used to trade fraudulently to be named as a party in a s. 540 suit. Section 540(3) is not applicable simply because that section applies only after the court finds the elements in s. 540(1) have been satisfied which was not the case here. Accordingly, the plaintiff had no cause of action against the tenth defendant and he should not be named as a party in this action. (para 32)
- (3) Consequent to the findings that the plaintiff had no cause of action against the second and tenth defendants, it must therefore follow that the plaintiff’s claim against the second and tenth defendants were plainly unsustainable and must fail. There were no particulars of the second and tenth defendants’ involvement in the first defendant’s business which purportedly had been carried out with intent to defraud the plaintiff. There was insufficient evidence to bring a case under s. 540(1) against the second and tenth defendants. (para 33)
- F **Case(s) referred to:**
Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA (*refd*)
Dato’ Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385 FC (*refd*)
Kawin Industrial Sdn Bhd (in liquidation) v. Tay Tiong Soong [2009] 1 MLJ 723 (*refd*)
LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC (*refd*)
- G **Legislation referred to:**
Companies Act 1965, s. 304(1)
Companies Act 2016, s. 540(1), (3), (4)
Interpretation Acts 1948 and 1967, s. 3
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)
- H *For the appellants - Ng Jun Wei & Ooi Wai Chun; M/s Amrit & Company*
For the respondent - Yusrin Faiz Yusof; M/s Faidz, Leong & Chong

[Editor’s note: For the High Court judgment, please see Johanjana Corporation Sdn Bhd v. Zamzam Arabic Food Sdn Bhd (Digulungan) & Ors [2021] 1 LNS 2041 (overruled).]
- I *Reported by Suhainah Wahiduddin*

JUDGMENT

A

Hadhariah Syed Ismail JCA:**Introduction**

[1] The appeal by the appellants (the second defendant and tenth defendant respectively) is against the decision of the High Court dated 5 October 2020 dismissing the appellants' application to strike out the respondent's writ of summons and statement of claim.

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[2] We heard and allowed the appeal on 4 January 2022. Our reasons for the decision are stated below.

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[3] In this judgment, the parties will be referred to as they were in the High Court.

Salient Fact

[4] The first defendant's company is the tenant of the plaintiff with regard to seven premises at Oasis 9, Jalan Tengku Ampuan Zabedah G/9, Seksyen 9, 40100 Shah Alam. Tenancy agreements were executed and signed between the plaintiff and the first defendant in respect of the seven premises.

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[5] At all material times, the first defendant's company operated all seven premises as an Arabic food restaurant and banquet hall known as "Restoran ZamZam".

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[6] The first defendant's company defaulted the tenancy agreements by non-payment of rental and refusal to surrender vacant possession upon expiry of the said tenancies.

[7] *Via* Shah Alam Sessions Court Suit No. B52 NCV-21-02-2018 (Suit 21), the plaintiff sued the first defendant for breach of tenancy agreements, arrears of rental, vacant possession and damages.

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[8] On 28 May 2018, the Sessions Court allowed the plaintiff's claim. The Sessions Court's decision was affirmed by the High Court.

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[9] It is an undisputed fact that the second defendant and the tenth defendant were never parties to the tenancy agreements. They were also not named as parties in Suit 21.

[10] The first defendant vacated the plaintiff's premises on 20 July 2018 and moved its business operation to another premises.

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[11] The second defendant is the company which currently runs the business of "Restoran Zamzam" at Seksyen 13 Shah Alam. The tenth defendant is the director and shareholder of the second defendant.

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- A [12] On 26 September 2018, the plaintiff discovered that during the active litigation between the parties, the first defendant's business operation and goodwill known as Restoran Zamzam was transferred to the second defendant wherein a new Arabic food restaurant under the same name was in active operation at No. 46, Jln Renang 13/26, Seksyen 13, Tadisma Business Park, 40100 Shah Alam.
- B [13] As the debt remained unpaid, the plaintiff filed a winding-up petition against the first defendant *vide* Shah Alam High Court Winding Up Petition No. BA-28 NCC-119-02-2019. The petition was allowed unopposed. The first defendant was wound up on 16 May 2019.
- C [14] As a result of the first defendant's failure to satisfy the judgment sum obtained in Suit 21, the plaintiff filed Suit No. BA-22NCC-147-11-2019 at the Shah Alam High Court against the 11th defendant. The plaintiff's claim against the defendants are for declarations that a fraud or fraudulent scheme under s. 540 of the Companies Act 2016 was perpetrated against the plaintiff
- D to evade the first defendant from paying its debt to the plaintiff and that the defendants are personally liable to pay the debt and liability of the first defendant in the sum of RM1,872,966.49 as at 31 October 2019 and interest at the rate of 5% per annum from the date of filing of the writ to satisfaction.
- E [15] The reliefs sought against the defendants are as follows:
- F (i) a declaration that the second, third and fourth defendants have been used by the first defendant company to avoid its obligations and responsibilities and with intent to defraud the plaintiff wherein a fraudulent scheme was carried out so that the assets, business and restaurant operations of the first defendant is transferred to the ZamZam Group of Companies which consisted of the second, third and fourth defendants in order to avoid paying the first defendant's debt to the plaintiff;
- G (ii) a declaration that the fifth, sixth, seventh, eighth, ninth, tenth and 11th defendants as directors, officers and shareholders of the first, second, third and fourth defendants have with intent to defraud the plaintiff wherein a fraudulent scheme was carried out so that the assets, business and restaurant operations of the first defendant is transferred to the ZamZam Group of Companies which consists of the second, third and fourth defendants in order to avoid paying the first defendant's debt to the plaintiff;
- H (iii) a declaration that the second to 11th defendants have colluded and conspired to carry out the business of the first defendant for a fraudulent purpose and shall be personally liable, without any limitation of liability, towards all debts and liability of the first defendant to the plaintiff; and
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- (iv) an order that the second to 11th defendants jointly and severally be made liable to the first defendant's debt to the plaintiff in the sum of RM1,872,966.49, general damages and interest at 5% per annum from the date of filing of the writ till satisfaction and costs. A

[16] The plaintiff's case based on s. 540 of the Companies Act 2016 is pleaded in para. 28 of the statement of claim as follows: B

28. Defendan pertama telah melalui pegawai-pegawai, pemegang saham dan syarikat-syarikat dalam Kumpulan Syarikat Zamzam tersebut telah menjalankan perniagaan dengan niat untuk memfraud plaintiff mengikut Seksyen 540 Akta Syarikat 2016 untuk mengelak jumlah penghakiman yang harus dibayar oleh defendan pertama kepada plaintiff. Memandangkan perniagaan dan operasi tunggal defendan pertama adalah perniagaan Restoran Zamzam tersebut, defendan pertama telah memindahkan asset, perniagaan dan operasi yang berkaitan dengan defendan pertama di mana Defendan kedua, ketiga, keempat, kelima, keenam, Ketujuh, Kelapan, Kesembilan, Kesepuluh dan Kesebelas adalah pada setiap masa berkenaan mempunyai pengetahuan akan keberhutangan defendan pertama tersebut dan penghakiman yang harus dibayar oleh defendan pertama kepada plaintiff. C

Butir-butir Dalam Mengelakkan Kewajipan Dan Tanggungjawab Undang-undang Dan/Atau Melakukan Skim Penipuan

- (a) Pada sekitar April 2014, defendan kelima telah memohon penukaran nama penyewa, memindah deposit sewa, deposit utility dan hutang sewa dan caj utiliti penyewa asal iaitu defendan ketiga sebanyak RM328,676.73 kepada defendan pertama dengan niat untuk tidak membayar keberhutangan tersebut; D
- (b) Pada 24.4.2014, defendan kelima sebagai pengarah kedua-dua syarikat defendan pertama dan ketiga membuat persetujuan bahawa kedua-dua syarikat mengaku janji untuk menjelaskan hutang yang dipindahkan tersebut, akan tetapi telah mungkir untuk memenuhi akujanji tersebut; E
- (c) Defendan pertama dengan sengaja enggan membayar sewa dan utiliti terkumpul bagi premis tersebut semenjak 1.8.2017 dengan niat untuk tidak membayar jumlah tertunda dari tarikh tersebut bersamasama sewa dua kali ganda sehingga premis-premis tersebut dikosongkan pada 20.7.2018; F
- (d) Defendan pertama telah menduduki premis-premis plaintiff tersebut tanpa kebenaran dari 25.11.2017 sehingga 20.7.2018; G
- (e) Defendan pertama telah beroperasi di premis-premis plaintiff tersebut secara tidak sah dan tanpa lesen premis dan lesen restoran dari 1.1.2018 hingga 20.7.2018 demi untuk mendapat hasil operasi restoran tanpa niat untuk membayar sewa; H

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- A (f) Defendan pertama mendirikan binaan tidak sah dan halangan di atas kawasan gunasama premis tersebut dan juga melakukan pelbagai kesalahan sehingga dikenakan dengan 17 saman oleh Majlis Perbandaran Shah Alam;
- B (g) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja tidak memfailkan akaun dan laporan tahunan bagi defendan pertama semenjak Januari 2017;
- (h) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja tidak menzahirkan alamat perniagaan defendan pertama dalam pendaftaran dengan Suruhanjaya Syarikat Malaysia (SSM) bagi menyukarkan perlaksanaan penghakiman;
- C (i) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja memindahkan alamat berdaftar defendan pertama dengan SSM dari No. 32-4-2, Jalan Semarak Api 3, Diamond Square, Off Jalan Gombak 53000 Kuala Lumpur, ke sebuah gudang kosong yang beralamat di Lot 24, Jalan Modal 23/2, Seksyen 23, 40300 Shah Alam, Selangor untuk menyukarkan penyerahan kertas kausa dan mengelakkan perlaksanaan penghakiman;
- D (j) Dengan niat untuk menghindari liabiliti dari tindakan undang-undang, sekitar Julai 2018, defendan kelima dan keenam sebagai pengarah defendan pertama telah memindahkan dan/atau melupuskan asset defendan pertama tanpa mengakaunkan pendapatan/keuntungan dari pemindahan atau pelupusan yang dilakukan;
- E (k) Defendan kelima dan keenam sebagai pengarah defendan pertama telah memindahkan asset, tenaga kerja perniagaan dan operasi restoran milik defendan pertama iaitu “Restoran Zamzam” dari Oasis 9, Jalan Tengku Ampuan Zabedah G 9/G, Seksyen 9, Shah Alam, Selangor kepada defendan kedua yang menjalankan perniagaan restoran yang sama (Restoran Zamzam) di alamat No. 46, Jalan Renang 13/26, Seksyen 13, Tadisma Business Park, 40100 Shah Alam, Selangor;
- F (l) Defendan kelima dan keenam sebagai pengarah defendan pertama telah membiarkan defendan pertama digulungkan pada 16.5.2019 akibat kegagalan untuk membayar hutang kepada plaintif;
- (m) Defendan kelima dan keenam sebagai pengarah defendan pertama telah menyembunyikan keuntungan perniagaan semasa operasi tidak sah di mana asset-aset telah dibawa keluar ke premis restoran baru yang dikendalikan dan di bahagi-bahagi antara defendan kedua, ketiga dan keempat supaya tidak dapat dikesan dan ditadbir oleh Pegawai Penerima iaitu pelikuidasi yang dilantik Mahkamah;
- H (n) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan pertama, iaitu defendan kelima, keenam, ketujuh, kelapan dan kesembilan yang mempunyai pengetahuan penuh berkenaan
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- jumlah penghakiman yang harus dibayar kepada plaintiff secara fraud telah bersetuju untuk memindah segala asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu “Restoran Zamzam” kepada defendan kedua, ketiga dan keempat; A
- (o) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan kedua iaitu defendan kelima, kelapan dan kesepuluh yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerima perpindahan segala asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu “Restoran Zamzam” dari defendan pertama; B
- (p) Pemegang saham-pemegang saham dan/atau pengarah-pengarah ketiga iaitu defendan kelima dan kesebelas yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerima perpindahan asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu “Restoran Zamzam” dari defendan pertama; dan C
- (q) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan keempat iaitu defendan kelima dan kesepuluh yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerima perpindahan asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu “Restoran Zamzam” dari defendan pertama. D
- [17] On 15 January 2020, the plaintiff withdrew the action against the 11th defendant as she had passed away. E
- [18] Interlocutory judgment has been obtained against the third, fourth and seventh defendants on 16 January 2020.
- [19] On 26 December 2019, the second defendant and the tenth defendant filed an application (encl. 16) to strike out the plaintiff’s writ of summons and statement of claim dated 5 November 2019 pursuant to O. 18 r. 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012 on the ground that it did not disclose a reasonable cause of action and was an abuse of court process. F G
- [20] The second defendant’s striking out is premised on the following four grounds:
- (i) Section 540 of the Companies Act 2016 only involves an individual and not a company. H
- (ii) The second defendant as a company does not fall within the definition of any person in s. 540(1) of the Companies Act 2016.
- (iii) Plaintiff had no cause of action against the second defendant.
- (iv) The first defendant’s failure to pay its debt to the plaintiff has nothing to do with the second defendant who is not a party to the tenancy agreements between the plaintiff and the first defendant. I

- A (v) On the face of the pleadings, the plaintiff's claim against the second defendant is obviously unsustainable.

[21] The tenth defendant's striking out application is premised on the following grounds:

- B (i) As the plaintiff had no cause of action against the second defendant, the tenth defendant as the director of the second defendant should not be made a party to this action.
- (ii) The second defendant was incorporated in 2015 and carry on a restaurant business simultaneously with the first defendant at the material time.
- C (iii) The plaintiff cannot prove that the tenth defendant had committed any fraudulent transaction as alleged by the plaintiff.

Decision Of The High Court

- D [22] On 5 October 2020, the learned Judicial Commissioner (JC) dismissed the second defendant and tenth defendant's application based on the following findings of fact:

- (i) The plaintiff's claim is not obviously unsustainable as sufficient particulars of fraud or fraudulent trading involving the second defendant and the tenth defendant have been pleaded in para. 28(a) to (q) of the statement of claim.
- E (ii) The word "person" in s. 540(1) of the Companies Act 2016 includes a corporation based on the definition of the word "person" in s. 3 of the Interpretations Act 1948 and 1967.
- F (iii) Section 540(1) read together with s. 540(3) and (4) of the Companies Act 2016 enabled any company or an individual who was involved in the activity or in receipt of proceeds of fraudulent trading to be named as a defendant.

G The Issues

[23] The three main issues raised in this appeal are as follows:

- (i) Whether the second defendant company is "a person" under s. 540(1) of the Companies Act 2016.
- H (ii) Whether the tenth defendant can be sued despite not being a director of the first defendant.
- (iii) Whether the plaintiff's claim against the second defendant and the tenth defendant was plainly unsustainable.

I

The First Issue**A**

[24] Section 540 of the Companies Act 2016 provides as follows:

540. Responsibility for fraudulent trading

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

B**C**

(2) Where a person has been convicted of an offence under subsection 539(3) in relation to the contracting of such a debt as is referred to in that section, the Court on the application of the liquidator or any creditor or contributory of the company may, if the Court thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

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(3) When the Court makes any declaration under subsection (1) or (2), the Court may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to the person, or on any charge or any interest in any charge on any assets of the company held by or vested in the person or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

E**F**

(4) For the purposes of subsection (3), “assignee” includes any person to whom or in whose favour by the directions of the person liable for the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration and consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

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(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one million ringgit or to both.

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(6) This section shall have effect notwithstanding that the person concerned is criminally liable under this Act in respect of the matters on the ground of which the declaration is made.

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- A (7) On the hearing of an application under subsection (1) or (2), the liquidator may give evidence or call witnesses himself.
- [25] Learned counsel for the second defendant submitted that s. 540(1) only applies to a person, *ie*, director and/or shareholder of the company who carried out the business of the company with intent to defraud a creditor. It was submitted that a plain reading of s. 540(1) clearly shows that any offence or wrongdoing is intended against an individual person and not against a corporation or a company. It is submitted that the second defendant, as a company, does not have a mind and/or knowledge of its own to carry on its business with intent to defraud a creditor. It was submitted that the plaintiff is attempting to strain the statute to implicate the second defendant and this amounts to an abuse of court process.
- B
- C
- [26] As the word “person” is not defined in the Companies Act, learned counsel for the plaintiff relies on s. 3 of the Interpretation Acts 1948 and 1967 which defines the word “person” to include a body of persons, corporate or unincorporate. Reading s. 540(1) together with s. 3 of the Interpretation Acts, learned counsel for the plaintiff contended that s. 540(1) applies to a real person and a company. The learned JC accepted the plaintiff’s contention.
- D
- [27] We agree with the submission of learned counsel for the second defendant. We take the view that s. 3 of the Interpretation Acts could not be read into s. 540(1) of the Companies Act as it would give effect to inconsistent meanings to s. 540(1). The underlying purpose of s. 540(1) is to impose a personal responsibility and liability on the director and/or the person who controls the company and not the company itself for carrying on the business of the company with intent to defraud a creditor. The wording in s. 540(1) is plain and unambiguous. The word “person” in s. 540(1) in its ordinary and natural meaning meant “a real person”. He could be a director, managing director or person in control of the company. Therefore, to give effect to s. 540(1), the court must apply the ordinary meaning of “person” and not the meaning assigned to it by the plaintiff.
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- [28] To accede to the plaintiff’s contention would render s. 540(1) meaningless because s. 540(1) had a penal consequence. Only a real person could have an intention to defraud a creditor. Such an intention does not exist in a company. For example, the act of purchasing goods with knowledge or intention of not paying for the goods because the company had no funds can only be made by a director of the company who carries on the business in that manner because a company does not have a mind to cheat; see *Kawin Industrial Sdn Bhd (in liquidation) v. Tay Tiong Soong* [2009] 1 MLJ 723; *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849; [2010] 1 MLJ 185.
- H
- I

[29] In *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385, the appellant, who was the managing director of a company was found personally liable by the High Court and the Court of Appeal to pay arrears of salary and workers' compensation amounting to RM2,910,201.78 for carrying on the business of the company with intent to defraud the employees pursuant to s. 304 of the Companies Act 1965. On appeal to the Federal Court, on the question of law: whether an employee who makes a claim of statutory emoluments and contribution was entitled to make a claim as a creditor for the purpose of s. 304(1) of the Act, under (held 1), the Federal Court said:

(1) Section 304 of the Act deals with fraudulent trading or carrying on a business with an intention to defraud creditors, A person will not be able to hide behind the corporate veil and avoid liability for the company's debts if he had used the company to perpetrate fraud and the company went into liquidation. The section provides for liability against directors personally on the basis that they carried on business of the company with the intention of defrauding creditors ...

[30] In *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666; [2016] 3 MLJ 479, the Court of Appeal said "The primary object behind sub-s. 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of company. Sub-section 304(1) affords the creditor of the company a civil remedy personally against such persons."

[31] We, therefore, find that the learned JC had erred in law in accepting the plaintiff's contention that the word "person" in s. 540(1) of the Companies Act include a company. For this reason, we find there is merit in the first issue raised by the second defendant. We hold that the word "person" in s. 540(1) of the Companies Act 2016 does not include a company. It therefore follows that the plaintiff did not have a cause of action against the second defendant, which is a company.

The Second Issue

[32] In this case, the first defendant was a company who had allegedly carried on its restaurant business with intent to defraud the plaintiff. The tenth defendant is not a director of the first defendant. The tenth defendant is a director of the second defendant. The tenth defendant had no involvement at all in the business of the first defendant. This being the case, it is our considered view that s. 540(1) is not applicable to an individual who is not a director in a company that carries on business with intent to defraud a creditor. For this reason, we find the learned JC had erred in holding s. 540(3) of the Companies Act enabled any person who is not a director in

- A the company used to trade fraudulently to be named as a party in s. 540 suit. In our opinion s. 540(3) is not applicable simply because that section applies only after the court finds the elements in s. 540(1) have been satisfied which is not the case here. Accordingly, we hold that the plaintiff had no cause of action against the tenth defendant and he should not be named as a party in this action.
- B

The Third Issue

- [33] Consequent to our findings that the plaintiff had no cause of action against the second and tenth defendants, it must, therefore, follow that the plaintiff's claim against the second and tenth defendants are plainly unsustainable and must fail. In this regard, we find that the learned JC had erred in his finding that sufficient particulars of fraudulent trading were pleaded against the second and tenth defendants. To the contrary, we find there were no particulars of the second and tenth defendants' involvement in the first defendant's business which purportedly had been carried on with intent to defraud the plaintiff. We find that para. 28(k) and (o) of the statement of claim are insufficient to bring a case under s. 540(1) against the second and tenth defendants.
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Our Decision

- E [34] For the aforesaid reasons, we allow the appeal and set aside the order of the High Court. The plaintiff's claim against the second and tenth defendants is hereby struck out.

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